Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1135

CONTINENTAL CASUALTY COMPANY, ET AL,
Respondents,

versus

CANADIAN UNIVERSAL INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

CONTINENTAL CASUALTY COMPANY, ET AL,
Respondents,

versus

CANADIAN UNIVERSAL INSURANCE COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays this Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on November 5, 1979.

OPINIONS BELOW

The trial judge in the District Court for the Eastern District of Louisiana (New Orleans Division) granted

plaintiffs' Motion for Summary Judgment and entered the attached Judgment without issuing an opinion. The Court of Appeals for the Fifth Circuit rendered its opinion on November 5, 1979 affirming the lower court. Both are appended to this Petition.

JURISDICTION FOR WRIT

The jurisdiction of this Court is invoked under 27 USC 1254(1). Petitioner seeks the Writ because the Court of Appeal has:

A. Failed to follow the principle this Court set forth in the *Bisso vs. Inland Waterways Corporation* decision which prohibited negligent parties to contract away their legal liability;

B. Sanctioned a departure from the usual course of judicial proceedings by allowing respondents to proceed in this litigation without establishing federal jurisdiction, a right to sue petitioner and, without following the mandates of Rule 56 of the Federal Rules of Civil Procedure governing motions for summary judgment and evidence to be considered therewith.

QUESTIONS PRESENTED

1. Whether respondents, as the legal liability insurers of the only negligent party in this litigation, can

avoid liability by contractually placing 50% of same on the contractual insurer of a non-negligent party;

2. Whether respondents established federal jurisdiction for bringing this lawsuit;

3. Whether respondents established a standing to sue petitioner in this lawsuit;

4. Whether the doctrine of res judicata should be applied to bar respondents' claim against petitioner;

5. Whether the lower courts sanctioned use of summary judgment proceedings by respondents, which was improper because absolutely no material facts supporting their position had been established by affidavit, stipulation, insurance policies, contracts, or otherwise;

6. The lower courts precluding applications of legal principles of indemnity in favor of contractual indemnity provisions through a ranking system it created without benefit of statute or guiding jurisprudence.

STATEMENT OF CASE

The person who precipitated all of this litigation nearly 9 years ago was Jack Fenner. He initially filed Jones Act and unseaworthiness claims against his employer, Continental Diving Service, Inc., Chevron Oil Company, and Aquatic Contractors and Engineers for damages received as a result of an accident on

October 3, 1969. Fenner eventually settled this claim for $160,000. Aquatic refused to contribute to the settlement on the ground it was Continental's fault alone which caused the loss, and Aquatic's liability was only vicarious or secondary to that of Continental, who was not entitled to contribution. The settlement was funded by Continental's legal liability insurers, respondents herein, and the initial litigation continued to determine, as between said insurers and Aquatic, who should bear the loss. The primary issue was whether the vessel owner, Aquatic, had legal or contractual indemnity rights over against Continental whose negligence caused its vessel to be unseaworthy. Continental and Aquatic entered into and filed into the record of the initial suit a Stipulation which recited the facts necessary to alleviate a trial in the district court and submitted same for a ruling. On June 5, 1974 the Court ruled that Aquatic, as the vessel owner, had no right to seek Ryan or active passive indemnity from the tort feasor, Continental, and ruled Continental's legal liability insurers only had to pay one-half of the above-described settlement with Aquatic being responsible for the other one-half. From that judgment Aquatic took an appeal and the Court of Appeals for the Fifth Circuit on December 13, 1976 sent the matter back to the district court on remand for dismissal because of want of jurisdiction.

Respondent, not withstanding the fact the Court of Appeal said they did not become subrogated to any rights their insured had against Aquatic, then filed this

suit against Aquatic and Canadian Universal Insurance Co., the contractual liability insurer of Continental Diving, seeking $80,000 or one-half of the settlement funds paid to Fenner. From the granting of a summary judgment against Canadian Universal in the amount of $80,000 an appeal was perfected again. This time the Court of Appeal affirmed the district court holding that the defense of res judicata was unavailable to petitioner; Continental Casualty was subrogated, conventionally by its insurance contract, to the rights of Continental Diving against Canadian Universal; that the motion for summary judgment was properly used by Continental Casualty and, on the merits, held since there was an express contract for indemnity owed by Continental to Aquatic this superceded Continental's implied warranty of workmanlike duty to Aquatic and therefore indemnity on delictual principles were "inconsequential". The Court went on to explain the delictual (or legal) rules of indemnity to one jointly cast who was only passively negligent is superceded by the implied warranty of workmanlike performance which is an implied contractual clause.

At no time whatsoever in the opinion by the Court of Appeals did it address the right, duty, and obligation of Aquatic, through counsel appointed by Canadian Universal, to seek indemnity and any other available defenses against the stipulated tort feasor in this case, Continental Diving. It also commented continually on petitioners' responsibilities under an insurance policy which never was attached to respondents' Motion for Summary Judgment or in any other way filed in the

record of this case. By handling the case in such a manner, it totally ignored the provisions of Rule 56 of the Federal Rules of Civil Procedure requiring the filing of such supporting documents in the record in support of the Motion for Summary Judgment.

LOWER COURTS' JURISDICTIONAL BASIS

In its complaint the respondents maintained they were foreign corporations, that petitioner, Canadian Universal, was a foreign corporation and that Aquatic Contractors and Engineers was a Louisiana corporation. The lack of pure diversity was alleviated when the lower court dismissed Aquatic Contractors and Engineers. The Fifth Circuit Court of Appeals pointed out respondents failed to comply with Rule 8 of the Federal Rules of Civil Procedure requiring a short and plain statement of the grounds upon which the court's jurisdiction depends. It felt the suit was based on three "maritime contracts", giving federal jurisdiction. Canadian objected to the lower courts' jurisdiction and was overruled.

REASONS FOR GRANTING THE WRIT

The lower courts allowed respondents to escape 50% of their liability by contracting it away in complete violation of this court's ruling in *Bisso vs. Inland Waterways Corporation*. In *Bisso* the question presented was can a towboat validly contract against all liability for its own negligent towage? This court held it could not. It found

a judicial rule, based upon public policy, invalidating contracts with towers to contract away all liability for their negligence. This Court said this rule was an extension of the general rule used by courts and legislatures to prevent enforcement of release from negligent contracts for two reasons: First, to discourage negligence by making wrongdoers pay damages; and second, protect those in need of goods or services from being overreached by others who have power to drive hard bargains. Petitioner submits the Fifth Circuit, in theory, advances the premise that a negligent party, and its legal liability insurers, may contract away liability for the insured's negligence which is a concept this Court in *Bisso* held was prohibited.

What led the lower courts to their erroneous decisions are the following basic facts they overlooked. First, the contract between Continental Diving and Aquatic required Continental to indemnify it against suits arising out of work performed under the contract even though they were caused by the negligence of Aquatic or by the unseaworthiness of vessels. Second, Canadian's policy insured Continental Diving and its contract with Aquatic therefore rendering Aquatic an "insured" under its policy. Under the terms and conditions of that policy Canadian was to pay all sums the insured "shall become legally obligated to pay" caused by an occurrence giving rise to damages. The contract also placed on Canadian a "duty to defend any suit" against the "insured". Third, Aquatic's defense, urged by its insurer, Canadian, was to assert a claim for in-

demnity based upon delictual grounds (active-passive negligence) and for a breach of workmanlike performance against Continental Diving and its liability insurers.

The Fifth Circuit was bent on establishing jurisdiction, a right by respondents to sue Canadian Universal, and then rendered a dialogue on why use of a summary judgment by plaintiff was proper. Unfortunately, it overlooked the above facts and when it got around to discussing the merits of the case its conclusion that Canadian's policy provided insurance to Continental Diving to cover indemnity Continental owed to Aquatic thereby making Canadian liable in this case was without supporting proof. If respondents had such proof it would have drawn the inescapable conclusion Canadian "insured" Aquatic and therefore was required to and had the "duty to defend any suit" against it. If the insurance policies and contract between the insureds were in evidence, the Court could have seen from a simple reading of same that Canadian *also* insured Aquatic and had to defend it. They were never attached to the Motion for Summary Judgment or filed in the record anywhere by any party! The Fifth Circuit therefore ignored Rule 56 which was promulgated by order of this Court.

Under its policy Canadian also had to pay "on behalf of the insured all sums the insured shall become *legally obligated to pay*". Since Aquatic was not "legally obligated" to pay plaintiff anything (by use of the Stipulation the Court of Appeal said could be used in this lawsuit) no payment was due by Canadian under its policy.

Based upon the foregoing Canadian submits the lower courts have departed from the accepted course of judicial proceedings and have sanctioned such departure by totally ignoring the requisites of Rule 56 of the Federal Rules of Civil Procedure. Subsection E requires supporting affidavits and sworn or certified copies of all papers or parts thereof referred to in the affidavit to be attached thereto or served therewith. This was never done by respondents. To circumvent this the Court of Appeals went back into the record of their previous decision, *Fenner vs. Continental Diving Service, et al*, 543 F.2d 1113, and culled out the information it wanted to use. Without copies of the insurance policies, the contract betweeen the parties, or a stipulation which was agreed to by both parties to be used in the *Fenner* litigation the lower courts are without foundation to rule as they have as well as without the necessary facts to understand the issues contained in this litigation.

The Fifth Circuit Court of Appeal has also ignored what it first held in *Fenner vs. Continental Diving*, regarding plaintiff's ability to receive subrogated rights of Continental Diving. This part of the opinion is quoted below:

> "Nor do the apparent beneficiaries — the legal liability insurers — of the trial court's ruling fare any better. There is no claim by Continental Diving against Aquatic to which the legal liability underwriters could be subrogated."

With this language how then, can the Court of Appeal today, three years later, turn around and say that Continental Diving has a subrogated interest and also a right to sue Canadian Universal? In answering this question in the affirmative one's judicial conscience is shocked.

After deciding Louisiana law applied, the Court then failed to follow it. The doctrine of res judicata, as set forth in Louisiana Civil Code Article 2286, states for this doctrine to apply the thing demanded must be the same, the cause of action must be the same, and the parties must be the same. In this case the thing demanded was the same as in *Fenner vs. Continental Diving* ($80,000); the cause of action is the same (contribution); and the parties have been the same in both suits for now nine years.

Even if the law was favorable to respondents there were contested facts in the record as a result of petitioner's denial of those submitted by respondents and therefore a summary judgment could not be granted. *Whitaker vs. Coleman; Benton vs. Volvo; Chapman vs. Hawthorne.*

The legal indemnity petitioner maintains it has the right to enforce in this litigation is the active-passive doctrine. Under this doctrine a right of indemnity exists in favor of the party guilty of passive negligence against the party guilty of active negligence. *Humble Oil vs. Naquin; Barrios vs. Louisiana Construction.*

The legal principles in the recent decision of the Fifth Circuit in *Cormier vs. Rowan Drilling* are applicable in this case. In *Cormier,* plaintiff was an employee of Dresser-Atlas and was sent to the Continental Oil platform in the Gulf of Mexico to work. Rowan had a contract with Continental to do drilling from the platform. When plaintiff was injured he sued Rowan and Continental. The jury found Rowan negligent and Continental free from negligence and judgment was awarded accordingly. The court also awarded Continental attorneys' fees. In reaching its decision on the attorney fee issue the Court of Appeals cited the *Tri-State vs. Delta* language as follows:

> "The party which is actively negligent should bear the consequences of its wrong and is responsible for damages incurred. Accordingly, it should indemnify the party which is only vicariously or secondarily wrong, for any damages the latter has been compelled to pay." Citing *Magnum vs. Keonsho; Acme vs. J. Ray McDermott; Humble Oil vs. Naquin; General Electric vs. Cuban.*

Petitioner submits the exact same situation is present in this case. Consequently, when determining the rights of Aquatic versus those of Continental Diving (which respondents and the lower courts would have you ignore in this matter) we can see the law clearly states Continental's *liability insurers* are those responsible for their negligent acts and Aquatic cannot be held

liable. Consequently, the insurer defending it, which is Canadian, cannot be held liable.

The Fifth Circuit's reliance on *Parfait vs. Jahncke Service, Inc.*, 484 F.2d 296, to hold Aquatic may not assert any legal or "delictual rules of indemnity" against Continental is completely misplaced. In *Parfait* the issue the Fifth Circuit dealt with concerned indemnity under the *Ryan* doctrine. Application of this doctrine alone is not the issue in this case. In fact, in *Parfait* the court held if a contractor breaches its warranty, and the breach proximately causes liability on part of the shipowner, then the shipowner is entitled to indemnity unless its own conduct precludes indemnity. Citing *Weyerhaeuser vs. Nacirima Operating Company*, 78 S.Ct. 438, and the *Ableanese vs. N.V. Neded. Amerik Stoomy*, 346 F.2d 481, decisions holding if the vessel owner did not handicap the stevedore on his vessel in his ability to do a workmanlike job then its conduct will not preclude indemnity.

This Court has never ruled upon the conclusion reached by the Fifth Circuit which literally ranked the indemnity principles set forth in this case. The Fifth Circuit's ranking placed delictual rules (active-passive negligence) of indemnity at the bottom with the implied warranty of workmanlike performance coming next and finally, at the top is contractual indemnity. Petitioner submits such ranking in this case is against this Court's decision in *Bisso* and premature since the Court of Appeal didn't even have the indemnity contract of the parties (or their insurance contracts for that matter) before making its ruling.

Petitioner also maintains the Louisiana law of contribution is applicable in this case. Louisiana Civil Code Article 2103 casts joint tort feasors in solidary liability. The right of contribution exists *only* where the joint tort feasors are judicially held to be solidarily liable to an injured party. *Auld vs. Globe Indemnity; Bolin vs. Hartford.* Where one party is not at fault he cannot be cast as a joint tort feasor. *Wooton vs. Wimberly.*

Since Aquatic was initially dismissed from the *Fenner vs. Continental* suit as not being a joint tort feasor, there can be no judgment now enforcing contribution against its insurer. Furthermore, petitioner should have the opportunity to enforce contribution in this suit against respondents which was denied by the lower court.

CONCLUSION

In this case the legal liability insurers have obtained a windfall by shifting 50% of their responsibility to non-negligent Aquatic. This windfall has been obtained because the Court of Appeal has sanctioned a departure from this Court's ruling in *Bisso* and a departure from the requisites of Article 56 of the Code of Civil Procedure. Furthermore, it has misinterpreted and misapplied Louisiana law. Cumulatively the Court of Appeal, by sanctioning the use of this summary judgment, has denied Aquatic the right to enforce legal indemnity principles against the sole tort feasor. For these reasons Canadian, suggests in the interests of justice, this Court grant this Writ of Certiorari to the end it may review the matter in its entirety.

RESPECTFULLY SUBMITTED:

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PROOF OF SERVICE AFFIDAVIT

I, Craig R. Nelson, attorney of record for Canadian Universal Insurance Company, petitioner herein, depose and say that on January 4, 1980, I served a copy of the foregoing Petition for Writ of Certiorari on Christopher Tompkins, counsel for Continental Casualty and Employers Surplus Lines Insurance Company, respondents herein, by placing same in the U.S. Mail.

/s/ CRAIG R. NELSON
CRAIG R. NELSON

Sworn and subscribed to before me at New Orleans, Louisiana, this 4th day of January, 1980.

/s/ JOSEPH F. CLARK, JR.
NOTARY PUBLIC

Three printed copies served on Christopher Tompkins by printer on January ____, 1980.

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APPENDIX

DORIS G. FENNER et al.,
Plaintiffs,

versus

CONTINENTAL DIVING SERVICE,
INCORPORATED, et al.,
Defendants-Appellees,

versus

AQUATIC CONTRACTORS & ENGINEERS, INC.,
Defendant-Appellant.

No. 74-2755.

United States Court of Appeals,
Fifth Circuit.

Dec. 13, 1976.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, and WISDOM and COLEMAN, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This is a case of now you see it, now you don't. Worse, it is a contrived controversy in which the wolf in sheep's clothing turns out to be the sheep. As Article III does not give us the shepherd's role, we dismiss for want of a judicial controversy between live litigants.

Ostensibly, this case presents many of the questions this Court faced recently in *Law v. Sea Drilling Corp.*, 5 Cir., 1975, 510 F.2d 242, 245-46, *reh. denied*, 5 Cir., 523 F.2d 793, but with a different twist. It is a fight among insurance companies who have attempted to construct a controversy in the name of others. The named parties are not the real parties in interest, *see* F.R.Civ.P. 17(a) — the named parties' claims have been settled or are covered by insurance. The real parties are Continental Diving's liability insurers — three legal and one contractual — in an internecine quarrel as to who bears all or part of the loss against their common assured.

The District Court found that under the settlement agreement which reserved the question of what underwriter was to bear one-half of the agreed payment, the contractual insurer (Canadian) of Continental Diving, the employer of the injured party, Fenner, was liable, not the legal liability insurers of the same assured, Continental Diving. The District Judge decided that this "indemnity" was based on Continental's contractual liability and that therefore its contractual insurer, not its legal liability insurers, must pay Aquatic's share attributable to the stipulated unseaworthiness of Aquatic's Barge. Here we must disagree. Since there was no question about Aquatic's liability, there was no

real case or controversy between the nominal parties. This is a private affray among underwriters, one of whom is not even a party, and therefore, we must vacate the District Court's findings and remand for dismissal.

The saga began when Ms. Doris Fenner brought a seaman's suit[1] on behalf of her then minor son, Jack, for injuries he received while employed as an apprentice diver for Continental Diving. Jack was seriously injured when a helium volume tank exploded as he worked aboard Barge WB 102 owned by Aquatic.[2] Fenner sued Continental Diving (his employer), Aquatic (the barge owner who had employed Continental Diving), and Chevron Oil Company[3] (who hired Aquatic to conduct the repairs to its offshore pipeline).

Fenner alleged negligence by Continental, who brought the helium tank on board, and unseaworthiness of Aquatic's barge.[4] Before trial, the parties reach-

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1 The Jones Act, 46 U.S.C.A. §688.

2 Presumably because this Court has held that a drilling barge, which like this one had no motive power but included living quarters for the crew, is a vessel, *Hicks v. Ocean Drilling and Exploration Co.*, 5 Cir., 1975, 512 F.2d 817, 824, the real parties stipulated that Fenner was a seaman — whether Bluewater or Sieracki is not disclosed — to whom the warranty of seaworthiness was owed.

3 Chevron asserted in its answer that Continental and Aquatic were independent contractors and therefore Chevron had no liability. Chevron also sued all interested insurance companies as third party defendants seeking contribution and indemnity. In a pretrial conference Fenner voluntarily dismissed his complaint against Chevron and Chevron dismissed all of its suits and cross claims.

4 Because of the express stipulation, there is no question that under the Jones Act the employer is liable to a Sieracki seaman for any negligence, *Offshore Company v. Robison*, 5 Cir., 1959, 266 F.2d

ed an agreement and stipulated several issues. Among those points agreed to were that Aquatic was not negligent, a leak in the volume tank was the proximate cause of Fenner's injury, Fenner was entitled to recover against Continental under the Jones Act and against Aquatic for unseaworthiness, and in full settlement, Fenner was to recover from Continental's legal liability insurers. The only issue reserved for further trial was whether, as to one-half of the settlement, Continental's liability insurers or its contractual insurers would bear the burden.[5] Significantly, the stipulation dismisssed Continental's counterclaim against its own contractual insurer, Canadian.[6]

769, 774; *Creppel v. J. W. Banta Towing, Inc.*, E.D.La., 1962, 202 F.Supp. 508, 512; *see Moore v. Associated Pipeline Contractors*, 5 Cir., 1972, 468 F.2d 815, 816, and the vessel owner is liable for unseaworthiness, *Grigsby v. Coastal Marine of Texas*, 5 Cir., 1969, 412 F.2d 1011, 1969 A.M.C. 1513.

5 The fiction, with imaginative resourcefulness, followed this curious course. Since unseaworthiness of Aquatic's barge was due solely to the defectiveness of the volume tank, Aquatic had an open and shut indemnity claim, either under the express contractual indemnity, or for breach of the warranty of workmanlike performance. Consequently, the internal struggle among Continental's underwriters was really a question of how much — and from whom — Aquatic would get reimbursement for a judgment it had never paid nor in which it was cast for a single *sous*.

6 Canadian is not a named party to this action and it did not sign the stipulation. Chevron originally joined Canadian but dropped this action when Fenner dismissed his suit against Chevron. App. 56. Note 2, *supra*. Continental also counterclaimed against Canadian for breach of contract, alleging that Canadian in defending Aquatic was actually cross-claiming against Continental which "effectively denies coverage under the policy of insurance for which it paid premiums to Canadian." App. 59. This claim was dismissed as part of the stipulation.

To fully understand the legal legerdemain attempted here it is necessary to know the players in insurers' garb. *See Kessler v. Pennsylvania National Mutual Casualty Insurance Co.*, 5 Cir., 1976, 531 F.2d 248, 250; *American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co.*, 5 Cir., 1957, 248 F.2d 509, 510. Otherwise, the hand may indeed be quicker than the eye. State Automobile and Casualty Underwriters is Continental's primary legal liability insurer and Continental Casualty Company and Employers' Surplus Lines are the excess legal liability insurers for Continental. Canadian Universal Insurance Company is Continental's contractual liability insurer. The conflict in this drama is between Canadian, claiming to represent Aquatic, and the legal liability insurers, who paid the settlement to Fenner.

At trial, Canadian, in the appealing garb of Aquatic, for natural reasons of self interest, disclaimed any right of contractual indemnity from Continental. Instead, it argued legal indemnity on the basis of the active-passive tort theory[7] or the *Ryan*[8] doctrine of warranty of workmanlike performance [WWLP]. *See D/S Ove Skou v. Hebert*, 5 Cir., 1966, 365 F.2d 341, 351, 1966 AMC 2223. Of course, the real Aquatic could care less (see note 5, *supra*).

Since the contract between Continental and Aquatic specifically provides that Continental will indemnify

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7 *Grigsby v. Coastal Marine Serv. of Texas, Inc.*, 5 Cir., 1969, 412 F.2d 1011, 1039-40, 1969 AMC 1513; *Tri-State Oil Tools Indus. v. Delta Marine Drilling Co.*, 5 Cir., 1969, 410 F.2d 178, 187, 1969 AMC 767.

8 *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 1966, 350 U.S. 124, 134, 76 S.Ct. 232, 100 L.Ed. 133, 142, 1966 AMC 9.

Aquatic for any liability resulting from work performed under the contract,[9] it may appear strange that Aquatic disclaimed contractual indemnity. But the sleight-of-hand is at last apparent — Aquatic is actually Canadian.[10] Aquatic — if there was anything to be indemnified for — will be indemnified under any theory, but Canadian will be liable for $80,000 only if Aquatic's liability is contractual.

The District Judge found that, nominally, Aquatic was responsible for one-half of the $160,000, but that it was indemnified based on the contract between Aquatic and Continental. Clearly under active-passive, *Ryan* or contract, Aquatic has no liability to Continental.

As between Continental and Aquatic, there was thus no controversy at all. Nor was there between Aquatic and Continental. Aquatic was not cast with any judgment nor had it paid anything other than legal costs which Canadian, the payer, does not challenge. All that was there was a claim by Continental's own insurer

9 App. 72. Oddly enough, and though not addressed by any of the insurers, the sweeping contractual liability coverage had a special exclusion which appears to rule out WWLP as a contractual claim:

> Contractual liability shall not be construed as including liability under a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner.

10 Apparently because the broad indemnity agreement from Continental to Aquatic required it to bear the legal cost and defense of claims brought by third parties by reason of operations within the scope of the indemnity, Canadian took over the defense of Aquatic and appointed counsel acting nominally for Aquatic, including, of all things, a probable outright conflict with the interest of its only and real assured, Continental (*see* note 6, *supra*).

(Canadian) that other insurers of the common assured should bear the loss. This was Canadian's claim only and it was not even a party to the litigation and it could not through subrogation under these circumstances wrap the mantel of Aquatic around it.

The Canadian policy, as did the others, defined the "insured" to include the named assured and various entities of which it was a part. In no sense was the indemnitee (Aquatic) an "insured", even though by virtue of the contractual indemnity it was assured that legal defense would ultimately be at the expense of Continental. Aquatic, not being an assured under the Canadian policy, Canadian, could not then step into the shoes of Aquatic, since the policy prescribed subrogation to the rights of the assured only.[11]

Since subrogation in Aquatic's name fails against Continental or its liability insurers, the only thing remaining is a possible claim by Canadian either in its own right or as subrogee to its assured (Continental) against the co-underwriters. Without Canadian even being a party, and standing as subrogee to Aquatic having failed, there was really no justifiable controversy at all before the Court between Canadian and the liability insurers. But glossing over this, Canadian's subrogation rights were to those of its assured (Conti-

11 7. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the *insured's* rights of recovery therefore against any person or organization and the *insured* shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights, the *insured* shall do nothing after loss to prejudice such rights. (Emphasis in original policy.)

nental) and there is nothing in the policy which gave Canadian subrogation rights against its own assured, or through it, to the other insurers. There being no relationship between it and the other insurers, it cannot latch onto liabilities which the others may owe to the assured (or third parties).[12] *See Kessler v. Pennsylvania National Mutual Casualty Insurance Co., supra,* at 256; *American Fidelity & Casualty Co. v. St. Paul-Mercury Indemnity Co.,* 5 Cir., 1957, 248 F.2d 509.

Nor do the apparent beneficiaries — the legal liability insurers — of the trial court's ruling fare any better. There is no claim by Continental Diving against Aquatic to which the legal liability underwriters could be subrogated. And while Canadian was once in the suit as a party, Continental's cross claim was dismissed as a part of the stipulation (see note 6, *supra*).

The result is that there are no live parties with a live controversy before the Court. To be sure, it is a lively controversy over which interesting law review comments might be written. But while we occasionally may be tempted into such an exercise, we must heed the

12 Canadian's policy was confined to (i) manufacturers and contractors and (ii) contractual liability. It provided:

> 6. Other insurance. The insurance afforded by this policy is primary insurance, except when stated to apply in excess of or contingent upon the absence of other insurance. When this insurance is primary and the *insured* has other insurance which is stated to be applicable to the loss on an excess or contingent basis, the amount of the company's liability under this policy shall not be reduced by the existence of such other insurance (emphasis in original).

Article III mandate and resist such importunities. Until such time as there are live combatants, the Court was powerless to act. So are we.[13]

VACATED FOR WANT OF JURISDICTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CONTINENTAL CASUALTY COMPANY, ET AL

versus CA No. 77-111-G

CANADIAN UNIVERSAL
INSURANCE CO., ET AL

Filed: June 9, 1977

JUDGMENT

The Court having on June 8, 1977, granted defendants' motion to dismiss as to Aquatic Contractors and Engineers, Inc. and denied as to Canadian Universal Insurance Co., and having further granted plaintiffs' motion for summary judgment against the remaining defendant Canadian Universal Insurance Co.

13 Assuming viable parties with a live controversy before a proper Court, we intimate no views on the underlying merits.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs, Continental Casualty Company and Employees Surplus Lines Insurance Company, and against defendant, Canadian Universal Insurance Co., in the amount of $80,000.00 plus legal interest from June 6, 1974 and costs.

IT IS FURTHER ORDERED that all claims against Aquatic Contractors and Engineers Inc. are DISMISSED.

Dated at New Orleans, Louisiana, this 9th day of June, 1977.

/s/ NELSON B. JONES
NELSON B. JONES, CLERK

APPROVED AS TO FORM:

/s/ MOREY L. SEAR
UNITED STATES DISTRICT JUDGE

CONTINENTAL CASUALTY COMPANY
and Employers Surplus Lines Insurance Company,
Plaintiffs-Appellees,

versus

CANADIAN UNIVERSAL INSURANCE CO.,
Defendant-Appellant.

No. 77-2374.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1979.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GODBOLD, GEE and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Stipulations are executed in the hope of minimizing litigation. They frequently achieve that end. Occasionally, however, they result merely in the escalation of hostilities, and serve as the basis for new disputes about the meaning of the agreement. In this appeal we consider just such consequences of a 1974 stipulation executed to end a 1971 personal injury suit. To bring that suit to a partial conclusion, an insurer of one of the principal defendants, pursuant to a stipulation with the other defendants, paid a substantial amount to the injured party in settlement of his claim. This final round is fought in its effort to obtain reimbursement of one-half the payment from another insurer. We conclude that the party who paid the compromise is entitled to recoup a share of what it has paid, and thus, we hope, end the eight year battle.

I.

These facts were established by a stipulation in the prior suit brought by Mrs. Doris Fenner on behalf of her minor son, Jack, against Continental Diving Service and Aquatic Contractors.

Jack Fenner was employed by Continental Diving as a diver's tender. Aquatic engaged Continental Diving to perform diving services that were necessary to enable Aquatic to complete its contract with Chevron Oil Company. In order to perform these services, Continental Diving's crew, including Fenner, went aboard an Aquatic barge, V-102, with their diving equipment. This equipment included a helium volume tank.

The volume tank was defective and it exploded, injuring Fenner. Aquatic was not negligent in any way. The claim against Aquatic was based on the unseaworthiness of its vessel, barge V-107, and Fenner's status as a member of its crew even though he was employed by Continental Diving. The presence of the defective volume tank on the vessel made it unseaworthy. Therefore, Continental Diving paid $160,000 to Fenner in compromise of his suit.

Continental Diving had asserted claims for indemnity and contribution against Aquatic. In a formal stipulation, the parties agreed that Continental Diving would bear one-half of the sum paid, because of the claims of negligence made against it by Fenner; that the other one-half was attributable to the unseaworthi-

ness of Aquatic's barge; and that they "reserve for trial and decision on this Stipulation and Memoranda [sic] by the court how" the second one-half "should be borne as between themselves as a matter of law."

This in effect was a stipulation that the contractor, Continental Diving, whose actions were agreed to have made unseaworthy a vessel owned by the firm with which it had a contract, Aquatic, might recoup what it had paid a person injured as a result of unseaworthiness of the vessel. It was patently unusual. The rationale for it was disclosed by facts in the record of the first case but not in the stipulation.

In its original contract with Aquatic, Continental Diving had agreed to hold Aquatic harmless against all claims arising out of the unseaworthiness of any vessel engaged in performance of the contract. Because of its obligations under this contractual indemnity clause, Continental Diving had obtained insurance from the Canadian Universal Insurance Company against contractual liability including any warranty that Continental Diving's work be performed in a workmanlike manner. Continental also had obtained insurance against legal liability, including claims arising against it delictually from three levels of insurers, referred to here only as Continental Casualty.[1] By various pleadings, all of the insurers were joined in the Fenner suit.

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1 The Jones Act and maritime delictual liability of Continental Diving was insured by State Automobile and Casualty, up to a limit of $5,000; by Continental Casualty for the next $20,000 as excess insurance; by Employer's Surplus Lines for $75,000 as excess; and then again by Continental Casualty for $400,000 excess, making a total insurance blanket of $500,000.

Canadian had assumed defense of the claim against Aquatic in Fenner's suit. In the stipulation Canadian was dismissed from that suit, but counsel retained by it executed the stipulation nominally on behalf of Aquatic.

Continental Casualty paid the full amount of the settlement with Fenner, then sought to recoup one-half from Canadian on the basis that the liability for the "unseaworthiness half" of the judgment resulted from Continental Diving's contractual indemnity of Aquatic and was, therefore, covered by Canadian's policy, rather than from the legal liability, maritime negligence, and Jones Act claims, covered by Continental Casualty's insurance. Canadian agrees that Continental Diving owed the payment to Aquatic but contends that the obligation was delictual, arising out of the principles of comparative negligence and breach of the implied warranty of workmanlike performance due by Continental Diving to Aquatic, as distinguished from the express contractual indemnity, hence that ultimate liability should be borne solely by Continental Casualty.

The insurers first attempted to resolve this question by further proceedings in the Fenner suit. The trial court decided in favor of Continental Casualty. Canadian, in the name of Aquatic, having itself been dismissed from the case, appealed to us. In *Fenner v. Continental Diving Service, Inc.*, 5 Cir., 1976, 543 F.2d 1113, we characterized the suit then before us as a "contrived controversy in which the wolf in sheep's clothing turns out

to be the sheep," and dismissed the suit "for want of a judicial controversy between live litigants." 543 F.2d at 1114. As we there said, it was "a fight among insurance companies who have attempted to construct a controversy in the name of others." *Id.*

We noted, too, that Canadian could not be subrogated to the rights of Aquatic because it was not Aquatic's insurer. "Canadian's subrogation rights were to those of its assured (Continental [Diving]) and there is nothing in the policy which gave Canadian subrogation rights against its own assured or, through it, to the other insurers. There being no relationship between it and the other insurers, it cannot latch onto liabilities which the others may owe to the assured (or third parties)." 543 F.2d at 1116-17. Accordingly, we dismissed that suit.

Continental Casualty then instituted this suit in an effort to recover from Canadian, and we now have the true parties in interest before the court. The complaint does not, as the rules require, contain "a short and plain statement of the grounds upon which the court's jurisdiction depends," Fed.R.Civ.P. 8, but it does allege the citizenship of the parties and, therefore, diversity jurisdiction is evident from the face of the complaint.[2] There is also jurisdiction in admiralty, 28 U.S.C. §1333, because the suit is based on three mari-

2 28 U.S.C. §1332(c). The 1964 amendment to that section provides that, "in any direct action against the insurer . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen . . . ." This is not, of course, such a direct action. In

time contracts, the Aquatic-Continental Diving contract and the two insurance policies.

Canadian asserted by motion to dismiss that Continental Casualty "could not become subrogated to any rights their assured . . . had *against Aquatic*" (emphasis supplied), and that its dismissal from the prior suit was with prejudice and res judicata. Continental Casualty in turn countered with a motion for summary judgment based on the stipulation in the prior suit; it also produced a letter between counsel evidencing an understanding that the prior dismissal was without prejudice, and that defense is now apparently abandoned by Canadian for it was not asserted before us.

II.

It is evident from our prior opinion that it determined nothing, for we said, "[W]e intimate no views on the underlying merits." *Fenner v. Continental Diving Service, Inc.*, 5 Cir. 1976, 543 F.2d 1113, 1117, n. 13. There is no basis for res judicata unless something is adjudged. It matters not if the thing demanded be the same or the cause of action and the parties be identical. *Cf.* La.Civ.Code Ann., art. 2286 (West 1952). Without a

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Campbell v. Insurance Company of North America, 5 Cir. 1977, 552 F.2d 604 (per curiam), we held that the attribution of citizenship likewise applies to a declaratory judgment action by the insurer against the injured party. *Contra, Aetna Casualty & Surety Insurance Co. v. Greene*, 6 Cir. 1979, ____ F.2d ____. This is neither a direct action by the injured party against the insurer nor the obverse situation considered in *Campbell*. Hence, the evident diversity of the two insurers gives us diversity jurisdiction and the 1964 curtailment does not deprive the parties of a federal forum.

judgment on the merits nothing is adjudicated. The judgment in this case was vacated for want of jurisdiction. It is frivolous to contend that such a determination would support a plea of res judicata, for only a final judgment suffices to do so. Fed.R.Civ.P. 41(b); *United States v. Lucchese*, 1961, 365 U.S. 290, 81 S.Ct. 565, 5 L.Ed. 568; *Costello v. United States*, 1961, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed. 551; *Watson v. Stynchcombe*, 5 Cir. 1974, 504 F.2d 393; *Oppenheim v. Sterling*, 10 Cir. 1966, 368 F.2d 516, 520. *See also Muchard v. Berenson*, 5 Cir. 1963, 307 F.2d 368, *cert. denied*, 1963, 371 U.S. 962, 83 S.Ct. 541, 9 L.Ed.2d 509.

III.

Continental Casualty in effect asserts that it is subrogated to the contractual claim of Continental Diving against Canadian (not Aquatic) arising out of Continental Diving's insurance contract with Canadian.

The first question, the answer to which is by no means clear, is whether we look to the law of Louisiana or to federal law to determine whether Continental Casualty is entitled to be subrogated to those claims. The mere fact that one basis of our jurisdiction is diversity does not answer the question. A maritime issue may be raised in a diversity suit; this is one significance of the savings-to-suitors clause, 28 U.S.C. §1333, which permits a litigant to obtain federal jurisdiction over, and jury resolution of, an admiralty question by invoking federal jurisdiction on an independent basis. *Romero v. International Terminal Operating Co.*, 1959, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368; *Fitzgerald v. United*

States Lines Co., 1963, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 770. A maritime claim may also be brought in state court. *Garrett v. Moore-McCormack Co.*, 1942, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239. However, while jurisdiction to decide the litigation may be concurrent with state courts or invoked in a federal court on some independent basis, maritime law determines the rights of the parties. *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099; *Garrett v. Moore-McCormick Co.*, 1942, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239; *Chelentis v. Luckenbach S.S. Co., Inc.*, 1918, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171. See discussion in G. Gilmore & C. Black, The Law of Admiralty 456 (2d ed. 1975).

The principles of subrogation, conceived in equity and nurtured by common law, have also been adopted in admiralty. *Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co.*, 5 Cir. 1962, 303 F.2d 692, 696-697 *cert. denied*, 1962, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276; *The Etna*, 3d Cir. 1943, 138 F.2d 37, 39; *In re New York Trap Rock Corp.*, S.D.N.Y. 1959, 172 F.Supp. 638, 647. It was in connection with a subrogation claim that Chief Judge Brown set the standard for us here:

> The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels.

Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co., 303 F.2d at 699 (footnote omitted).

The right of subrogation is not founded in contract. "It is a creature of equity; is enforced solely for accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." *Memphis & L.R.R. Co. v. Dow*, 1887, 120 U.S. 287, 301-302, 7 S.Ct. 482, 489, 30 L.Ed. 595, 601. *See also United States v. Continental Casualty Co.*, 5 Cir. 1975, 512 F.2d 475. It is administered so as to secure justice without regard to form and applies in all cases in which one party, not a volunteer, pays a debt for which another is primarily liable, which in equity and good conscience should have been paid by the latter. *In re Forester*, 9 Cir. 1976, 529 F.2d 310, 314-15; *Industrial Development Board v. Fugua Industries, Inc.*, 1975, 523 F.2d 1226 (applying Alabama law); *Travelers Indemnity Co. v. Peacock Construction Co.*, 5 Cir. 1970, 423 F.2d 1153, 1158 & n. 10; *Compania Anonima Venezolana De Navegacion v. A. J. Perez Export Co.*, 5 Cir. 1962, 303 F.2d 692, 697, *cert denied*, 1962, 371 U.S. 942, 83 S.Ct. 321, 9 L.Ed.2d 276; *American Fidelity & Casualty Co. v. United States Fidelity & Guaranty Co.*, 5 Cir. 1962, 305 F.2d 633 (in which we granted subrogation in favor of one automobile liability insurer against another insurer of the same assured).

Section 81 of The Restatement of Restitution (1937) provides:

> Unless otherwise agreed, a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, except where the payor is barred by the wrongful nature of his conduct.

The rule applies whether the parties are primary or, as here, secondary obligors, and to suretyship situations. *Id.* Comment b. Therefore, if Continental Casualty discharged the duty owed by Canadian to Continental Diving, a matter we will later undertake to explore, then Continental Casualty is subrogated to the rights of Continental Diving.

Subrogation may be conventional as well as equitable. *Millers Mutual Fire Insurance Co. v. Farmers Elevator Mutual Insurance Co.*, 5 Cir. 1969, 408 F.2d 776. The contract of insurance between Continental Casualty and Continental Diving provides that Continental Casualty is subrogated to all the insured's rights of recovery of any payment made under the policy. Therefore Continental Casualty would be subrogated under both federal rules to the claims of Continental Diving.

All of the cases we have cited state and apply general principles of subrogation that seem to be applicable here. However, we have found no federal decisions dealing with the precise subrogation issue before us, the payment by one insurer of the debt claimed to be due by another insurer to their common insured. In connection with marine insurance, which has in general been considered an admiralty contract, G. Gilmore and C. Black, The Law of Admiralty 53 et seq. (2d ed. 1975) we have held that, if there is no controlling federal decision of the specific issue before us, we should apply state law. *Lemar Towing Co. v. Fireman's Fund Insurance Co.*, E.D.La. 1972, 352 F.Supp. 652, *aff'd*, 5 Cir.

1973, 471 F.2d 609, *cert. denied*, 1973, 414 U.S. 976, 94 S.Ct. 292, 38 L.Ed. 219. *See also Travelers Indemnity Co. v. Gulf Weighing Corp.*, E.D.La. 1972, 352 F.Supp. 355. This is a sort of renvoi, in which the admiralty court adopts state law as part of the maritime corpus juris. We will look, therefore, to state law to determine whether a different result would obtain.

The Louisiana Civil Code provides that subrogation may be either conventional or legal. La.Civ.Code Ann. art. 2159 (West 1952). Conventional subrogation occurs "[w]hen the creditor, receiving his payment from a third person, subrogates him in his rights . . . against the debtor; this subrogation must be expressed and made at the same time as the payment." Art. 2160. This provision, however, means only that the agreement of subrogation may not be entered into after the payment; in the case of an agreement that, if a party pays a debt in the future, he shall be subrogated to the rights of the creditor, payment of the debt, without more, operates as a subrogation. *Cooper v. Jennings Refining Co.*, 1907, 118 La. 181, 42 So. 766. As we have pointed out, Continental Casualty's insurance policy with Continental Diving provides for subrogation of Casualty to Diving's right to recover any payment made under the policy on Diving's behalf.

Where there is such a subrogation stipulation in an insurance contract, subrogation takes place automatically at the time of payment as an incident to it. *State Farm Fire & Casualty Co. v. Sentry Indemnity Co.*, La.App. 1977, 346 So.2d 1331. *See also Brown v. Zito*, La.App.

1976, 333 So.2d 649 (where the policy and evidence of payment of the sum sued for were not placed in evidence, and the court held that this was not fatal because the testimony and the exhibits compelled the conclusion that the policy provided "as usual" for subrogation); *American Auto Insurance Co. v. Twenty Grand Towing Co.*, La.App. 1969, 225 So.2d 114. Louisiana courts, we conclude, would hold that, when Casualty paid the loss suffered by Diving, its assured, it became subrogated conventionally by virtue of the terms of its insurance contract to the rights of Diving against Diving's other insurer, Canadian.

There is yet another reason why Canadian should not now be permitted to assert that Continental Casualty lacks the right to sue: Canadian entered into a stipulation agreeing that Continental Casualty would pay Fenner's claim and reserving for decision only how one-half of that sum should be borne as between Continental Casualty and Aquatic, whom Canadian has pretended throughout the two suits to be, a costume that we criticized as poor-worn in our prior decision. In fact the claim for unseaworthiness was always a claim against Continental Diving, and Canadian was Continental Diving's insurer. We should not now permit Canadian belatedly, as afterthought, to assert Continental Diving's lack of standing to sue on the claim that Canadian expressly agreed to litigate. Had the question of standing been raised when the stipulation was being discussed, it would likely not have been signed by Continental Casualty or it would have been rephrased to eliminate this issue. Canadian is now estopped to don sheep's garments.

IV.

A few words suffices for the next claim: that the stipulation was, like a theater ticket, good only for one performance, the prior suit, and cannot now be relied upon. The stipulation contains no such limitation. The record in the prior suit demonstrates that the parties to that litigation well knew how to limit the effect of a stipulation to a single suit.[3] The stipulation was patently intended to be used in future litigation, for it reads, "Aquatic and Continental Diving reserve for trial and decision *on this Stipulation* and Memoranda [sic] by the Court how one-half of the $160,000 settlement . . . should be borne as between themselves . . . ."[4](emphasis supplied). There is no contention that

3 The stipulation of liability presented to the court as a basis for its findings under the Jones Act in *Fenner v. Continental Diving Service, Inc.*, E.D.La., June 6, 1974, No. 71-2815, recites:

> In the event a final decree is not rendered by the United States District Court for the Eastern District of Louisiana, based upon this stipulation then this joint stipulation is to be null and void and may not be used in any litigation involving in any way the parties to this litigation.

4 The stipulation read in part:

> "Parties undersigned have made certain agreements with respect to the compromise and settlement of part of the issues presented in this litigation, and they leave for judicial disposition the balance of the issues.
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> * * * * * *
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> 13. State Automobile & Casualty Underwriters, Inc., as primary insurer, and Employers Surplus Lines Insurance Company and Continental Casualty Company as excess insurers insured Continental Diving for its legal liability to Fenner as per attached policies.

the stipulation was improvident or that it did not reflect the agreement of the litigants. *See Central Distributors, Inc. v. M.E.T., Inc.*, 5 Cir. 1968, 403 F.2d 943; *Logan Lumber Co. v. Commissioner*, 5 Cir. 1966, 365 F.2d 846; *cf. In re Westinghouse Electric Corp.-Uranium Contracts Litigation*, 10

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16. Continental Diving Service, Inc. hereby dismisses its counterclaim against Canadian Universal Insurance Company, the contractual liability insurer of Continental Diving, as per attached policy, each party to bear its own costs.

* * * * * *

17. Aquatic and Continental Diving reserve for trial and decision on this Stipulation and Memoranda by the Court how one-half of the $160,000 settlement payment made to Fenner as set forth in stipulation 14 attributable under stipulations 5 through 10 and 12 to the unseaworthiness of Aquatic's barge should be borne as between themselves as a matter of law.

18. The liability insurers of Continental Diving [e.g. Continental Casualty] contend that Continental Diving's liability to indemnify Aquatic for the amounts for which it would initially be cast, by reason of the unseaworthiness of the barge, is a contractual liability and therefore Canadian Universal (the contractual indemnity insurer of Continental Diving) should bear said one-half of the settlement.

19. Aquatic (through defense counsel appointed by Canadian Universal to defend Aquatic) contends that by way of proper defense of Aquatic, Aquatic should exercise all legal rights of indemnity as against, inter alia, Continental Diving and its liability insurers, and that as a matter of law, because of the foregoing stipulations, particularly 5-10 inclusive, Aquatic is entitled to legal indemnity from Continental Diving and its liability insurers (who are similarly not legally entitled to any contribution from Aquatic on the judgment in favor of Fenner) and therefore no residual legal liability rests upon Aquatic, vis-a-vis Continental Diving, upon which the contractual indemnity could operate (other than cost of defense which has previously been furnished) and Continental Diving's liability insurers should bear the whole loss caused by negligence of Continental Diving and may not secure reimbursement for half of said loss from Aquatic.

Cir. 1978, 570 F.2d 899. Canadian has neither sought to repudiate the stipulation nor shown any cause, good or otherwise, why it should not be admitted. *Compare Mittlieder v. Chicago & Northwestern Railway Co.*, 8 Cir. 1971, 441 F.2d 52.

There is no greater merit to the argument that summary judgment was improper because there were genuine disputes as to material issues of fact. In response to the motion for summary judgment, Canadian filed nothing but this cryptic pleading:

> Defendants deny plaintiffs' material facts in paragraph 1-3.

Rule 56(e) of the Federal Rules of Civil Procedure expressly condemns to the trash-heap of antiquated pleading-style this method of battle by general denial. It requires:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Even now, Canadian sets forth no material facts about which there is any dispute whatever. Assuredly, it contests Continental Casualty's right to recover on the merits but it suggests no material factual issue that might be decided differently if evidence were adduced. We assume that Canadian could demonstrate that the barge was made unseaworthy only by Continental Diving's equipment. That assumption is made in favor of Canadian; and if Continental Casualty could recover even were that proved, then the factual issue is no longer material at this state of the proceedings. On this basis, the trial court correctly decided that the case could be decided on the summary judgment motion.

V.

We come at last to the merits. If Continental Diving's liability to Aquatic arose out of the indemnity provision in the contract, it was covered by Canadian's policy; if it arose delictually, or out of the warranty of workmanlike performance, it was excluded from Canadian's coverage, as our original opinion shows, *Fenner v. Continental Diving Service, Inc.*, 5 Cir. 1976, 543 F.2d 1113, 1116 n. 9, and such liability was included in Continental Casualty's policy by express provision.

As Judge Edward J. Boyle, Sr., the experienced judge who considered this issue in the first litigation, pointed out, the implied warranty recognized in *Ryan Stevedoring Co. v. Pan Atlantic Steamship Co.*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, arises only in the absence of express provision for indemnity. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 1958, 355 U.S. 563, 569, 78

S.Ct. 438, 442, 2 L.Ed. 491, 495; *Evans v. Triple R Welding & Oil Field Maintenance Corp.*, 5 Cir. 1973, 472 F.2d 713, 716; *Shenker v. United States*, 2 Cir. 1963, 322 F.2d 622; *D'Agosta v. Royal Netherlands Steamship Co.*, 2 Cir. 1962, 301 F.2d 105; *Dery v. Wyer*, 2 Cir. 1959, 265 F.2d 804. Here there was an express contract for indemnity that superseded both any implied warranty and any implied right to indemnity. *Compare Olsen v. Shell Oil Co.*, 5 Cir., 1979, 595 F.2d 1099. Whether, in addition, Continental Diving would have owed Aquatic indemnity on delictual principles is, therefore inconsequential.

Continental Diving's liability to Aquatic did not arise out of an implied warranty; the liability was founded on the express indemnity agreement between th[illegible]m. It is, therefore, immaterial that, in the absence of such a contractual provision Continental Diving might have had an implied duty to indemnify Aquatic under the WWLP. *See Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 1958, 355 U.S. 563, 569, 78 S.Ct. 438, 442, 2 L.Ed. 491, 495. The *delictual* rules of indemnity whereby a tort feasor who is actively negligent owes indemnity to one jointly cast who is only passively negligent, *see Magnum Marine v. Kenosha Auto Transport Corp.*, 5 Cir. 1973, 481 F.2d 933; *Tri-State Oil Tool Industries, Inc. v. North Marine Drilling Co.*, 5 Cir. 1969, 410 F.2d 178, are superseded by the implied WWLP, an implied *contractual* clause. *Parfait v. Jahncke Service, Inc.*, 5 Cir. 1973, 484 F.2d 296. The contractual clause that would have been im-

plied in the absence of express agreement is in turn superseded by the express provisions of the contract. Canadian's policy provided insurance to Continental Diving for precisely this exposure. Continental Casualty, as Diving's subrogee, is entitled to recover from Canadian for a loss resulting from the very risk Canadian collected a premium to insure.

For these reasons, the judgment of the district court is AFFIRMED.